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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, *et al.*,
Appellants,
v.
FRANK E. MIDKIFF, *et al.*,
Appellees.

PORTLOCK COMMUNITY ASSOCIATION, *et al.*,
Appellants,
v.
FRANK E. MIDKIFF, *et al.*,
Appellees.

KAHALA COMMUNITY ASSOCIATION, INC., *et al.*,
Appellants,
v.
FRANK E. MIDKIFF, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* THE OFFICE OF HAWAIIAN AFFAIRS IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS [1]

Your amicus is the Office of Hawaiian Affairs ("OHA"), established by the Constitution of the State of Hawaii.[2] The Office is a public body corporate, within, but independent of, the executive branch. The Office is funded by a share of the State's revenues from public lands.[3] It is a fourth branch of the government, unique to the State of Hawaii.

The Office of Hawaiian Affairs has the constitutional and statutory responsibility (among others): to enhance the "betterment of conditions" of Native Hawaiians and Hawaiians;[4] to serve as the principal state agency responsible for the "performance, development and coordination" of all programs and activities relating to Native Hawaiians and Hawaiians (except the Hawaiian Homes Program); to assess the policies, procedures and practices of the other agencies which impact on Native Hawaiians and Hawaiians; and to apply for and administer "grants and donations from all sources" to be used for programs benefiting Native Hawaiians and Hawaiians.[5]

The Appellees, being the trustees under the Will of Princess Bernice Pauahi Bishop, great-granddaughter and last lineal descendant of Kamehameha the Great, the first

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[1] Appellants and Appellees have consented to the filing of this amicus curiae brief. The letters of consent have been filed with the Clerk of the Court.

[2] HAW. CONST. art. XII, § 5 (1978). The Office of Hawaiian Affairs was established by an amendment to the Hawaii Constitution proposed by a regular Constitutional Convention convened in 1978 and ratified by the vote of the citizens of the State of Hawaii later that same year.

[3] HAW. REV. STAT. § 10-13.5 (Supp. 1982).

[4] In this brief, the term "Native Hawaiian" means a descendant of not less than one-half part of the blood of the (Polynesian) race which originally inhabited the Hawaiian Islands (i.e. prior to 1778). A "Hawaiian" means *any* descendant of that race.

[5] HAW. REV. STAT. § 10-3 (Supp. 1982).

Monarch of all the Hawaiian Islands, administer the perpetual charitable trust established by her Will. The trust was established by this Native Hawaiian, a beloved princess of the Hawaiian People, as the sole support of The Kamehameha Schools, which today provide a wide range of educational programs and services to Native Hawaiians and Hawaiians, both young and old. Because the programs and services offered by the Schools are of such scope and penetration, they readily enhance the betterment of conditions of Native Hawiians and Hawaiians through the process of education and training.

Because the statute challenged herein, as applied to the lands held in trust by the Appellees for these worthy purposes, may seriously affect the common beneficiaries of OHA and the Schools, your amicus feels constrained to speak out concerning pertinent facts and issues so as to help this Honorable Court make a wise and fully-informed decision herein.

STATEMENT OF THE CASE

While it accepts the Statement of the Case presented by the Appellees, your amicus earnestly feels that the following supplemental facts require the Court's review in its deliberations on the issues presented on appeal by the parties herein.

I. THE HAWAIIANS' LOSS OF THEIR LAND, THEIR SOVEREIGNTY AND THEIR CULTURE

Before its contact with Western Civilization, Hawaii persisted for nearly a thousand years as an outpost of a complex Polynesian Civilization. During this period, the Hawaiians had developed a highly complex culture founded on a stable land tenure system, a thriving co-operative and subsistence economy, a sophisticated societal hierarchy and religious practices which controlled every facet of the daily life of all.

Under the land tenure system, the main islands were divided into several separate kingdoms, with a high chief or king (*ali'i nui* or *mo'i*) controlling an island or part of an island. Each ali'i nui first reserved lands for his own use and then distributed the remaining lands to his most loyal chiefs. The chiefs would retain lands for *their* own use and pass on the rest to *their* followers.[6]

While other land division existed, the *ahupua'a* was the land unit most closely related to the every day life of the people. Ahupua'a varied widely in size, but usually were economically self-sufficient units whose boundaries ran from the mountain tops down ridges to the sea.[7] By design, the ahupua'a afforded to the chief and his people "a fishery residence at the warm seaside, together with the products of the high lands, such as fuel, canoe timber, mountain birds, and the right of way to the same, and all the varied products of the intermediate land as might be suitable to the soil and climate of the different altitudes from sea soil to mountainside or top." [8]

A lesser chief (*ali'i ahupua'a*) or sometimes a land agent (*konohiki*) administered the ahupua'a. Most ahupua'a were further divided into smaller units; sometimes administered separately.

A highly-structured society operated within this land division pattern. At the top were the ali'i nui and priests (*kahuna*), then came the ahupua'a chiefs, the konohiki and, finally the commoners, the *maka'ainana*. The maka'ainana worked together under the direction of chiefs and priests in tilling common areas within the ahupua'a to support the chiefs and the priests. The maka'ainana, however, also had certain gathering rights within the bounda-

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[6] J. CHINEN, THE GREAT MAHELE 5 (1958).

[7] *In re Boundaries of Pulehunui*, 4 HAW. 239, 241-42 (1879); Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 849 (1975).

[8] *In re Boundaries of Pulehunui*, 4 Haw. at 241.

ries of the ahupua'a and small parcels of land for their own use.[9]

Private ownership of land in the western sense had no place in the pre-contact Hawaiian culture. Although the chief was said to control the *use* of certain lands he did not own them. Rather, he held them *in trust* for all of the people. The chief's tenancy was *at will* and, when conquest or death brought someone new into the picture, lands would be redistributed according to the preference of the new chief.

The maka'ainana were not serfs. If the konohiki should mistreat them, they could simply pick up and move to another district. If this happened too often in an ahupua'a, the chief might question the konohiki's administrative abilities and replace him.

> This ancient land system was thus sharply different from Western ideas of private land ownership. The alii nui (or moi) himself enjoyed no absolute ownership of all the land. The alii nui was a trustee of all the people within an island (*moku*) or some other larger district. The konohiki also maintain a similar tentative position because the maka'ainana were free to leave the ahupuaa if they were unhappy with a particular chieftain (alii) or konohiki. In short, the members throughout the political hierarchy shared a mutual dependence in sustaining their subsistence way of life.[10]

To say that, traditionally, the ancient Hawaiians had a strong tie to the land would be an *understatement*. Surely the soil was there to till, the forests and mountain streams and lowland springs held their abundance, and

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[9] M. Kelly, Changes in Land Tenure in Hawaii, 1778-1850, at 25-26 (June 1956) (unpublished thesis in University of Hawaii Library).

[10] HAWAII INSTITUTE FOR MANAGEMENT AND ANALYSIS IN GOVERNMENT, HAWAII DEPARTMENT OF BUDGET AND FINANCE, LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 148 (1979).

the bounty of the shore and its abutting off-shore waters was there waiting to be gathered. However, there was more . . . much more! The Hawaiian even today looks to his native land as a major source of spiritual power to him.

Western contact and its attendant influences brought rapid changes. While the powerful Kamehameha the Great was alive, little was done to change the system.

His son, Kamehameha II, decided that he would not redistribute the lands upon his father's death in 1819.[11] Westeners applauded this action. Under Kamehameha II, many of these Westerners were given land by the King and the chiefs in return for their services. These grants were made with the understanding that the lands would eventually be returned as under the traditional system, but both the Westerners and some of the Hawaiians now began to feel that it was only reasonable to hope that the land might be retained.

Finally in 1825, when Kamehameha III took the throne at the age of 12, the Council of Chiefs convinced him to adopt a new policy allowing the chiefs to retain the land upon the death of a king and permitting succession by inheritance.[12]

A growing agricultural economy, begun by Westerners, applied new pressures for change in the land tenure system. By 1839, Kamehameha III had declared that property ownership, such as existed on a limited basis, was protected by due process of law.

In 1840, a constitution was adopted for the first time. The constitution, among other things, codified the King's status as a trustee when it came to the holding of the lands. Also in 1840, a statute was enacted providing that:

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[11] LEVY, *supra* note 7, at 850.

[12] 1 R. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854, at 119-22 (1938).

"No man living on a farm whose name is recorded by his landlord, shall without cause desert the land of his landlord. Nor shall the landlord causelessly dispossess his tenant." [13]

In 1841, Kamehameha III announced a plan allowing his island governors to lease land to foreigners for terms up to fifty years.[14]

Unsatisfied, American and British interests keenly sought further changes in the land tenure system. In 1846, a "Board of Commissioners to Quiet Land Titles" was established to investigate and confirm or reject all claims of private individuals, whether natives or foreigners, to land acquired prior to the creation of the Commission.[15] Its decisions, subject only to appeal to the Hawaii Supreme Court, were to be based on existing land law of the kingdom, including "native usages in regard to landed tenures . . ." [16] The Commission had five members: two were Hawaiians, one was half-Hawaiian, and two were Americans.[17]

At first, the Commission dealt only with title to building lots in the major towns of Honolulu and Lahaina and claimants proving rights to these lands received Land Commission Awards. Even though the concept of fee simple ownership was not part of the Hawaiian system, the Minister of Interior issued patents in fee simple on these awards.[18]

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[13] Act of November 9, 1840, § 6, reprinted in THE FUNDAMENTAL LAW OF HAWAII 18-19 (Thurston ed. 1904).

[14] 1 KUYKENDALL, *supra* note 12, at 275-76.

[15] Act of April 27, 1846, Pt. I, ch. VII, art. IV reprinted in 2 REVISED LAWS OF HAWAII 1925, at 2120-24 [hereinafter cited as "RLH 1925"].

[16] *Id.*, § 7 reprinted in RLH 1925, at 2123.

[17] 1 KUYKENDALL, *supra* note 12, at 280.

[18] Act of April 27, 1846, *supra* note 15, § 10, reprinted in RLH 1925, at 2123.

In 1846, the Commission adopted a set of principles, which were subsequently ratified by the legislature.[19] The principles were prefaced by a statement that "there are but three classes of persons having vested rights in the land, 1st, the government [the King], 2nd, the landlord, and 3rd, the tenant . . ."[20] Most everyone agreed, but just how these principles would be effectuated was hotly debated. Finally, in December, 1847, the King and the Privy Council announced that the King would retain his private lands, "subject only to the rights of the tenants," and that the remaining land of the kingdom would be divided into thirds: one-third to the government, one-third to the chiefs and konohiki and the final third to the tenant maka'ainana.

The so-called *Mahele* (meaning "division") began in 1848. At stake were some four million acres of land.

First, the King quitclaimed his interest in specific lands under the control of 251 chiefs to them and the chiefs quitclaimed their interest in the balance of the lands to the King. Later, the King divided his lands into two parts. The larger portion he "set apart forever to the chiefs and people of my Kingdom." The smaller portion, approximately one million acres, he retained for himself, his heirs and successors.[21] These retained lands were known as "the King's Lands," while those he gave to the government were designated as "Government Land."

Under the Mahele, the chiefs could receive fee title to their lands by either paying a commutation tax of one-third of the value of the unimproved land or by ceding one-third of their land to the government and receiving fee title to the balance.

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[19] Principles Adopted by Land Commission on August 20, 1846, reprinted in RLH 1925, at 2124.

[20] *Id.* at 2126.

[21] *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 722-23 (1864).

The division and distribution of land amongst the chiefly class notwithstanding, the statutes and awards consistently provided that the grants of title were subject to the rights of tenants on the land.

Finally, the Kuleana Act of 1850 allowed for the granting of fee simple title to the native tenants for the small parcels of land they occupied (*kuleana*).[22] A kuleana parcel usually lay *within* the large land holding of the King, the Government or a chief. However, kuleana could *only* include the land which a tenant had actually cultivated, plus a house-lot of not more than a quarter of an acre. The native tenant was required to pay for a survey of the land and present the testimony of two witnesses concerning his right to the land. Approximately 7,500 Land Commission Awards involved kuleana lands, but only twenty-six percent of the eligible native population received awards.

By the time the Land Commission's work ended in 1855, over one and one half million acres had been distributed to the chiefs or konohiki, nearly one and one half million acres had been set aside as Government Lands, approximately one million acres had been retained by the King and less than 30,000 acres had been claimed by the commoners.[23]

As the rights of the Hawaiian People in land diminished, the rights of Westerners increased. An 1846 law authorized sales of Government Land and, by May of 1850, over 27,000 acres of land had been sold.[24] Under 1850 legislation, any resident of Hawaii was allowed to own and convey land, regardless of citizenship.[25]

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[22] Act of August 6, 1850, reprinted in RLH 1925, at 2141-42.

[23] 1 KUYKENDALL, *supra* note 12, at 294.

[24] J. HOBBS, HAWAII, A PAGEANT OF THE SOIL 54 (1935).

[25] Act of July 10, 1850, reprinted in RLH 1925, at 2233-34.

Within fifty years after the Mahele, large-scale plantation agriculture and the drive for acquisition of land by the plantation owners spawned a wide-spread loss of land ownership and control by the Hawaiians.

> With a permanent population of fewer than two thousand, Westerners took over most of Hawaii's land in the next half-century and manipulated the economy for their own profit. They had already stripped the land of its only readily exploitable resource, sandalwood. After the Reciprocity Treaty of 1876, which allowed Hawaiian sugar to enter the United States duty-free, Western-owned sugar plantations dominated the Hawaiian economy. That the local population did not participate in this economy proved no obstacle; laborers were imported from the Orient and Europe. By the turn of the century Hawaiians were a minority in their own homeland.[26]

The ancient land divisions worked well for a plantation economy and control of several ahupua'a provided the basis for a plantation's operations. The extensive level areas with rich soil in midlands were planted and sugar's insatiable thirst was served well by up-land water supplies brought down the slopes by gravity-fed ditches. Harvested crops were taken out by boats serving coastal harbors.

Many kuleana were lost as a result of changes in the economy and the Hawaiian's failure to understand the foreign legal and institutional systems. Hawaiian farmers could not earn a subsistence living on their small plots of land without the right to pasture their animals or grow crops on unoccupied portions of the ahupua'a. Some kuleana lands that had been leased to Westerners were simply never returned, and others were lost to surrounding landholders through adverse possession.

The chiefs were likewise unable to retain their lands. The great majority of them were heavily in debt by the

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[26] LEVY, *supra* note 7, at 858 (footnotes omitted).

1840's. Sandalwood was gone and the only thing of value left was land. Debts to Westerners were paid in land, attempts at large-scale agriculture failed and large estates were lost through foreclosures.[27]

Government land was also lost to others. By 1893, 613,233 acres of land had been sold by the Kingdom; the bulk of the land ultimately going to Westerners.[28]

The King's lands were freely sold by the successive monarchs. In 1855, Kamehameha IV, for instance, is said to have sold the entire ahupua'a of Waihe'e on the Island of Oahu for $48.00. When Kamehameha IV died intestate, his widow claimed her intestate share and dower rights in his land. The Hawaii Supreme Court held that those lands did not descend to the *heirs* of the King, but rather descended to the successors to the *throne*. Each successor, had the right to dispose of the land as if it were his private property.[29] By the Act of January 3, 1865, the King's lands were designated as "Crown Lands" and the same were declared inalienable, to descend to the successors to the Hawaiian crown forever.[30]

As the plantation economy flourished, plantation owners secured long-term leases on large tracts of Government and Crown Lands. The 1890 census (the last taken before the overthrow of Hawaii's monarchy) revealed the extent to which land had been secured by American and European residents. Of a total population near 90,000, fewer than 5,000 actually owned land. The relatively small number of Westerners owned over one million acres. Although 3 out of 4 landowners were Hawaiian, 3 out of 4 acres belonging to private owners were held by Westerners.[31]

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[27] *Id.* at 860.

[28] *Id.* at 859.

[29] *In re Estate of His Majesty Kamehameha IV*, 2 Haw. at 725.

[30] Act of January 3, 1865, § 3, reprinted at RLH 1925, at 2178.

[31] L. FUCHS, HAWAII PONO: A SOCIAL HISTORY 251 (1961).

While the Hawaiian was being rendered landless, political intrigues were leading inexorably towards his becoming nationless as well. Inside the little Kingdom, resident foreigners, especially Americans, pressed for greater political power to the resident population and complementary reductions of the sovereign's power. In 1852, Kamehameha III proclaimed a new constitution which truncated his powers by requiring that the Privy Council and Prime Minister approve certain acts of the King. Kamehameha IV chafed under this constitution and Kamehameha V abrogated it, signing a new one in 1864.[32]

The 1864 Constitution restored some of the monarch's powers. After Kamehameha V's and King Lunalilo's short reigns, King Kalakaua came to the throne in 1874. By 1887, Kalakaua had yielded to demands and appointed a new cabinet which would write a new constitution; the so-called "Bayonet Constitution of 1887," which virtually reduced the King to ceremonial status.

The King's military power was placed under legislative control, his executive powers were transferred to a cabinet appointed by him, but answerable only to the legislature, and the House of Nobles was converted to an elective body by the 1887 constitution. The privilege of voting was extended to foreign resident males, regardless of citizenship, and two classes of voters were established: one of which could vote only for Representatives and the other which could vote for Representatives *and* Nobles. Property qualifications for voting were set so high that many Hawaiians were effectively disenfranchised.[33]

In 1892, Queen Liliuoukalani succeeded to the throne. Like Kalakaua, she felt that the 1887 Constitution not only unreasonably limited the monarch's prerogatives, but also put too much power in the hands of resident Westerners, many not even citizens of Hawaii.

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[32] R. KUYKENDALL, CONSTITUTIONS OF THE HAWAIIAN KINGDOM 27 (1940).

[33] *Id.* at 50.

On January 14, 1893, Liliuokalani was prepared to declare a new constitution to restore some of the Crown's powers and require that the vote be reserved to citizens (natural born or naturalized).[34] When word spread of the Queen's new constitution, a "Committee of Public Safety" was formed. It was made up of thirteen members of a club called "The Annexation Club" which had been formed a year or so earlier.

Representatives of this Committee visited the U.S. Minister to Hawaii, John L. Stevens, to seek his support. Stevens replied to the request by stating that the troops on board the *U.S.S. Boston*, anchored in Honolulu Harbor, "would be ready to land any moment to prevent the destruction of American life and property, and in regard to the matter of establishing a Provisional Government, they of course would recognize the existing government whatever it might be."[35] That evening, Committee members formulated plans and drafted documents for a provisional government.

On January 15, 1893, the Committee pressed the Queen by informing members of her cabinet that they intended to declare the throne vacant. The Queen relented, saying that she would *not* install the new constitution.

Nonetheless, on Monday, January 16, 1893, accusing the Queen of "revolutionary acts" (no less), the Committee appealed to Minister Stevens for United States military aid.[36] Public meetings were held that day and, late in the day, a company of United States Marines was landed from the *Boston*. Alarmed, the Queen sent a note to Minister Stevens, but received no reply.[37]

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[34] 3 R. KUYKENDALL, THE HAWAIIAN KINGDOM, 1874-1893, at 585-86 (1967).

[35] J. BLOUNT, HAWAIIAN ISLANDS, Exec. Doc. No. 47, 53rd Cong., 2d Sess. 497 (1893).

[36] *Id.* at 118.

[37] 3 KUYKENDALL, *supra* note 34, at 593-96.

By January 17, 1893, the Committee of Safety had completed its statement deposing the Queen and a volunteer army had been ordered to assemble. Members of the Committee proceeded to the government building where they took possession without a struggle. From the steps of the building, a proclamation was read declaring that the existing government was overthrown and a provisional government established in its place. The insurgents immediately requested and obtained recognition from Minister Stevens.[38]

Liliuokalani, herself, wrote this account of that day:

> At about two-thirty P.M., Tuesday, the establishment of the Provisional Government was proclaimed; and nearly fifteen mintes later Mr. J. S. Walker came and told me "that he had come on a painful duty, that the opposition party had requested that I should abdicate." I told him that I had no idea of doing so. . . . I immediately sent for [my cabinet ministers and advisors]. The situation being taken into consideration, it was found that, since the troops of the United States had been landed to support the revolutionists, by the order of the American minister, it would be impossible for us to make any resistance.[39]

As night fell, Liliuokalani, in order to avoid bloodshed and under protest, surrendered to th. "superior forces of the United States."[40] The provisional government, led largely by Americans, took over Hawaii, leaving the Hawaiians without a homeland.

The complete breakdown of the ahupua'a and its societal structure had caused the Hawaiians to relocate into newly urbanized areas or in other ways to dislodge themselves from the lands they had cultivated for hundreds of years.

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[38] *Id.* at 601.

[39] LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 387 (12th ed. 1976).

[40] *Id.*

The land, as the centerpiece of their culture, was no longer theirs. The nation, with warrior Kings and powerful chiefs and chiefesses at its head, was now also gone. The Hawaiian culture, with its beautiful language, its poetic chants and songs, its intricate dances, its all-important folklore and genealogies, its arts and crafts, and its agrarian expertise was next to go.

The Hawaiian language had been the official language of the Monarchy even while the intensity of Western contact grew. Surely, the commercial language of greatest prevalence was English, but Hawaiian persisted as the official language of the Hawaiian government, as long as *it* existed. Then, when Hawaii became a United States Territory, even Hawaiian's usage as the official language ended.

The shift from heavy usage of Hawaiian to an obligatory use of English, combined with the influx of non-English speaking immigrants from around the globe, resulted in a loss of general fluency in the Hawaiian language and an incomplete learning of English.

> In part, the demise of the Hawaiian language came from a Territorial policy banning the use of the Hawaiian language in schools, ostensibly to improve the mastery of English. The loss by itself might not have been harmful culturally if, indeed, [Hawaiians] mastered English and used that medium to carry the Hawaiian features of the nineteenth-century contact culture into the twentieth century. In the case of religion, such occurred. [Hawaiians] generally converted to Christianity and used that form of organized religion to express their unique Hawaiian spirituality. But in language no true substitution occurred. Rather, a "lingua franca" (pidgin English) evolved, lacking the structure and breadth to express the varied nuances of thought.[41]

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[41] Lopez-Reyes, *The Demise of the Hawaiian Kingdom: A Psychocultural Analysis and Moral Legacy (Something Lost, Something Owed)*, 18 HAW. B.J. 3, 10 (1983) (footnote omitted).

Anthropology tells us of the importance of a language to a culture. Obviously, a language is fused irretrievably with the culture from which it springs. It is also obvious that cultural concepts cannot be expressed without the use and understanding of the language best designed to articulate them.

In the days following the overthrow of the Kingdom, a strong emphasis was placed officially upon the "Americanization" of Hawaii. Politically, the leaders of the provisional government (who became the leaders of the Republic of Hawaii) needed to show that Hawaii would be ripe for annexation.

To stress Americanism and downplay the importance of any of the other cultures (and certainly the *native* one) was of total importance. Thus, from 1893 until Hawaii became a State in 1959, a major policy of its government was to prove beyond a reasonable doubt that Hawaii, despite its multicultural population, was just another slice of America.

To do this, the efficacy and influence of the Hawaiian culture had to be drastically reduced. It was necessary to debilitate the Hawaiian culture. The same was true of the immigrant cultures represented in Hawaii. Those cultures also felt the impact. Happily for them, transfusions of fresh cultural knowledge and experiences were readily available from their homelands. For Hawaiians, the *source* of their culture was the primary target of these attacks. This *was* their homeland. *Where* was the cultural replenishment expected to come from?

The whole *existence* of the Hawaiians as a People complete with a culture, a standing, an ethnic foundation, was in jeopardy. Actually, the loss of the Hawaiian Culture by Native Hawaiians and Hawaiians was nearly complete. That, together with the loss of land and loss of sovereignty, added up to a complete loss of *status*.

> The immediate result, *loss of status*, continues to plague [Hawaiians] to the present day. A *loss of pride in culture* subsequently occurred. Loss of cultural pride was already manifest during the development of a contact culture, but after the overthrow, such loss became widespread and traumatic. In this period, the *loss of language* (and its ability to give special expression to cultural nuances) became almost total. However, the *loss of land* which severed [Hawaiians] from a fundamental source of their identity, triggered what may be called a cultural *identity crisis*. From these losses and perhaps in response to this crisis, there *emerged an outsider's culture* which, for all practical purposes, further removed many [Hawaiians] from their original cultural roots. Collectively these six experiences are the content of a Hawaiian cultural trauma.[42]

II. THE PRESENT LOT OF THE HAWAIIAN PEOPLE

During 1983, two comprehensive reports concerning the present condition of the Hawaiian People were published.

The first of these is the Native Hawaiians Study Commission's *Report on the Culture, Needs and Concerns of Native Hawaiians* (1983) to the U.S. Senate Committee on Energy and Natural Resources and the U.S. House of Representatives Committee on Interior and Insular Affairs, made pursuant to Public Law No. 96-565, 94 Stat. 3321, *et seq.* (1980), 42 U.S.C. § 2991 (1980), hereinafter called "NHSC Report."

The other is the Native Hawaiian Educational Assessment Project's Report to the U.S. Secretary of Education (1983), mandated by Public Law No. 96-374, 94 Stat. 1499 (1980), 20 U.S.C. § 1221-1, hereinafter called the "Educational Assessment Report."

Each of these reports contains lengthy discussions of certain statistics which reflect upon the welfare of Native Hawaiians and Hawaiians today.

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[42] *Id.* at 6.

We learn that in 1778, the population of Hawaii was estimated at some 300,000 (virtually all, of course, Native Hawaiian) and that, during the next one hundred years, the population of Hawaiians (including Native Hawaiians) declined to approximately 47,500.[43] The nadir in the Hawaiian population (34,000) was reached in 1893. At the turn of this century, fortunately, the Hawaiian population began to increase rapidly. By 1980, there were over 175,000 Native Hawaiians and Hawaiians.[44] This is a young population. In 1980, the median age for males was 22.00 and for females 23.2.[45]

The percentage of Native Hawaiians and Hawaiian children between the ages of 14 and 17 who enrolled in school in 1970, however, was the lowest of any group in Hawaii.[46]

Only 46.9 percent of all persons of Hawaiian ancestry over 25 years of age had graduated from high school and only 4.6 percent had completed four or more years of college.[47]

Ethnically related employment rates are linked to educational levels. The low levels of educational achievement noted above carry forward into employment figures. According to the 1970 U.S. Census, 4.3 percent of Hawaiian men and 5.2 percent of Hawaiian women in the civilian labor force were unemployed in 1970.[48] These figures compare with 2.6 percent for men and 3.7 percent for women for the State of Hawaii overall. The unem-

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[43] 1 NATIVE HAWAIIANS STUDY COMMISSION, U.S. DEPT. OF INTERIOR, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 68 (June 23, 1983).

[44] *Id.* at 70 (Table 6).

[45] *Id.* at 70 (Table 7).

[46] *Id.* at 78.

[47] *Id.* at 47.

[48] *Id.* at 76.

ployment rate for Hawaiian men was also higher than the average U.S. rate (3.9 percent).

> The unemployment rate for [Hawaiian] males was significantly higher than that for the Japanese, Chinese, Filipino, and White groups. Japanese men had the lowest unemployment rate at 1.4 percent. [Hawaiian] women also had a higher unemployment rate than other ethnic groups, except for the White group.
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> The percent of [Hawaiian] males in the labor force, 76.4 percent, was similar to that for the Chinese, Filipinos, and the average U.S. rate. It was lower than the percentage for the State as a whole, 81.5 percent, for Japanese, 79.7 percent, and for Whites, 86 percent. However, it should be noted that almost 45 percent of the White male labor force was in the armed forces.[49]

Based on data from a *1975* Census update survey of the Office of Economic Opportunity, the estimated unemployment rate for Hawaiians was 11.6 percent compared with 6.5 percent for the State of Hawaii as a whole.

The employment rates quoted above, while telling, are *quantitative* in nature. They do not allow us to make a *qualitative* analysis of the employment enjoyed by Hawaiians. Data for 1975 distributed by men employed in the occupational structure of Hawaii show that Hawaiians still lag behind other ethnic groups. Only 17.8 percent of Hawaiians are classified as "professional-technical, managerial," compared to 33.6 percent for Caucasians, 34.3 percent for Japanese, and 50.4 percent for Chinese. On the other hand, 53.6 percent of Native Hawaiians have occupations classified as "blue collar," while 42 percent of Caucasians, 42.2 percent of Japanese and 21.2 percent of Chinese have blue collar jobs. It should be noted that Filipinos and Portuguese fare even worse than Hawaiians: 16 percent of Filipinos and 17.7 percent of Portu-

[49] *Id.* at 49.

guese are classified as professional, while 55.4 percent of Filipinos and 58.1 percent of Portuguese have blue collar jobs. Over 22 percent of Hawaiian men have jobs in the "menial" occupational category, a higher percentage than that of any of the other five ethnic groups studied.[50]

It follows, of course, that lower income levels would be enjoyed by those in lower echelon jobs. Accordingly, 1977 median income levels enjoyed by Hawaiians were lower proportionately than other ethnic groups. Here, there are figures for "pure Hawaiian" and "part Hawaiian," which are not directly equivalent to Native Hawaiian and Hawaiian, respectively:[51]

Chinese	$21,183
Japanese	19,431
Caucasian	19,005
Part-Hawaiian	13,615
Filipino	12,683
Pure Hawaiian	9,278

In 1975, 41,483 Hawaiians, or about 27 percent, were classified as below the poverty level. In 1982, when Hawaiians comprised approximately 12 percent of the total state population, they made up a significantly higher percentage of those on welfare (AFDC-UP: 30.8 percent; General Assistance: 22.1 percent).[52]

The experience of Hawaiians in the criminal justice system is also telling. The percentage of Hawaiian adults arrested in 1981 was much greater than the Hawaiian percentage share of the population (23 percent versus 12 percent). The percentage of Hawaiians arrested for specific crimes was also, in many crime categories, larger than their share of the population. The data related to

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[50] *Id.* at 50.

[51] *Id.* at 51.

[52] *Id.* at 79.

Hawaiian juveniles arrested in 1981 was even more striking. Hawaiian juveniles comprised the largest percent of those arrested for *every* crime examined, from murder to running away.[53] In a recent study of incarceration, a researcher found that nearly 60 percent of the prison population in the State of Hawaii was Hawaiian.[54]

The impact of Western diseases on the Hawaiians was historically devastating. Waves of epidemics reduced the estimated contact population of 800,000 in 1778 to 34,000 by 1893. At the turn of this century, acquired immunity and inter-marriage, however, was reversing this trend. Demographic trends now indicate that the population had reached its lowest level in the final decade of the 19th century, would stabilize for about twenty years, and then begin a dramatic recovery.

Today's Hawaiian population is comparatively young and numbers an estimated 175,000 individuals.

> The health characteristics of this group, however, are adversely and consistently affected by mental health disorders, stress-related diseases, and an absence of culturally-sensitive health professionals.
>
> As developed in depth within the body of this study, the following findings are offered:
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> - the psychological despair and sense of being a conquered people in their own homeland is a factor in the health conditions of [Hawaiians];
> - [Hawaiians] have the lowest life expectancy of any ethnic group in the State of Hawaii: 67 years compared to a Statewide average of 74 years;
> - the leading causes of death for [Hawaiians], in order of prevalence, are heart diseases, cancers, stroke and accidents;

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[53] *Id.* at 80.

[54] *Id.* at 53.

- [Hawaiians] have the highest infant death rate in the State of Hawaii: 14 per 1,000 live births compared to a statewide average of 10 per thousand;
- mental health assessments indicated that [Hawaiians] have a higher-than expected incidence of personality disorders, mental retardation, and drug abuse than their proportion of the population; and
- suicide rates among [Hawaiian] males (statistics are unavailable for females) is the highest in the State of Hawaii; 22.5 per 100,000 in the population, compared to a rate of 13.5 for males of all races in Hawaii—rates in the 20-34 year age group of [Hawaiians] were even higher.

[Hawaiians] continue to experience a form of fatal impact usually associated with the last century. Neither Hawaiian nor Western medicine has effectively halted the damage.[55]

Reviewing the statistics discussed above, one can assay the lot of Native Hawaiians and Hawaiians today. The huge, vibrant native population found in Hawaii by the first Westerners in 1778 was reduced to about one-tenth its size in a scant 115 years. Between 1893 and 1983 that population, including all Pure Hawaiians (9,366) and Part-Hawaiians (166,087), has yet to reach its 1778 level (300,000). Good health and its practice continues to evade Native Hawaiians and Hawaiians. The Hawaiian People have appeared at the bottom of all of the indicators of success in a modern American society for years, perhaps most of this century. There seems to be a reduced impetus amongst Native Hawaiians and Hawaiians to do anything about it. Young Hawaiians have few role-models

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[55] 2 NATIVE HAWAIIANS STUDY COMMISSION, U.S. DEPT. OF INTERIOR, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 149-50 (June 23, 1983).

which encourage their personal efforts to excell and succeed in the society which is Hawaii today.

United States Senator from Hawaii Daniel K. Inouye is quoted as saying, a few years back:

> Two years ago, I visited Nanakuli High School, located right in the middle of Hawaiians Homes land. Over 90 percent of the students were Hawaiians. Yet their teachers were Chinese, Japanese, [Caucasian], and one Filipino. The only Hawaiians in evidence were the janitors, the food service employees, the guards and maintenance crew. There was no Hawaiian history course except the one that the Filipino teacher offered after school on a voluntary basis. Her text for the class was James Michener's *Hawaii*.
>
> I ask you to imagine how the Hawaiian child feels when he sees the adults of his race cleaning yards, collecting garbage, washing dishes—when he sees—that few are teachers, lawyers or doctors, even if all the pursuits are honorable and necessary tasks.[56]

What needs to be done to improve this dismal picture? The Native Hawaiian Educational Assessment Project set out to study the statistics and arrive at findings which would answer that question. The major recommendations of the Project are as follows:

> I. Continue to emphasize Basic Skills; build upon success with lower-achieving students; build success for potential higher-achieving students.
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> II. Develop interagency programs aimed at individualizing support for Hawaiian students and families with special needs.
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> III. Support Hawaiian and Multi-cultural Studies.
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> • • • •

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[56] NATIVE HAWIIAN EDUCATIONAL ASSESSMENT PROJECT, FINAL REPORT TO THE U.S. SECRETARY OF EDUCATION 101 (July 1983).

> IV. Conduct further research into educational needs related to the unique cultural situation of [Hawaiians].[57]

Where would one implement these recommendations? Certainly, you say, in the public schools of Hawaii! Unfortunately, the Educational Assessment Report contains many references to the severe problems being experienced by the State Department of Education in trying to cope with the special educational needs of Hawaiian youngsters. In fact, according to the study, the Department in itself is a major part of the problem.

> The Public Education system in Hawaii represents and propounds a cultural definition different from Hawaiian culture. It is infused with values and activities originating in America, or in the "Western" tradition. It is currently administered and taught by a staff disproportionately Japanese. The pattern has been called "institutional racism." The nature of the institution of school lends itself to a vicious cycle in which the groups who succeed best become those who run the system, which further decreases the chances for other groups' success. The bias is felt throughout the system, from the selection of books and materials to the social organization of the classroom.
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> * * * *
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> Many individuals see the basic problem for Hawaiians in the area of education as being the fundamental mismatch between Hawaiian cultural traditions and the Western educational system as it has evolved in the United States and throughout the world. . . .[58]

It is submitted that the educational programs and services operated with great effectiveness by The Kamehameha Schools and funded by the trust for which

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[57] *Id.* at x-xi.

[58] *Id.* at 169.

Appellees herein are the trustees may offer substantially the most important solution to the problems faced by Native Hawaiians and Hawaiians today.

The Kamehameha Schools serve 2,850 full-time Hawiian students on-campus, and more than 33,000 Hawaiian students in the public schools. In addition, the Schools offer thousands of other Hawaiians enrichment programs, ranging from live-in summer programs for elementary school students, to practical programs for adult Hawaiians, such as courses for expectant mothers.

Based on the findings and recommendations of the Native Hawaiian Educational Assessment Project, the Appellees are embarking upon even broader programs of enormous worth to the Hawaiian People.

III. THE ROLE OF APPELLEES EQUIVALENT TO THAT OF KONOHIKI OF OLD

The loss of their lands and their sovereignty experienced in the last century by Native Hawaiians and Hawaiians is discussed at length above. To many Native Hawaiians and Hawaiians, the lands bequeathed by Princess Bernice Pauahi Bishop, the lands of the Kamehameha family, "belong" to *them* in the sense expressed in the Hawaiian culture of pre-contact times. The Appellees, they reason, are but Konohiki for Ali'i Pauahi. As they hold her lands in trust, so did the konohiki of olden days hold the lands left in *their* charge in a sacred trust.

What a travesty it would be, they say, to breach that trust and take the land away, for these lands do not belong to the Appellees nor to the settlor of this great trust but to all of Princess Pauahi's people, the Hawaiian People.

SUMMARY OF ARGUMENT

Act 307, Session Laws of Hawaii 1967, now codified in part as Hawaii Revised Statutes Chapter 516, contains a preamble entitled "Findings and Declaration of Neces-

sity" which is nominally a legislative justification for passage of the Act, and speaks of an alleged social problem in land ownership perceived by the legislators. It says the need for single-family residential lots is critical and attributes this scarcity to a concentration of ownership of land in "the hands of a few." The public purpose of the Act is said to be the curing of this social problem. Chapter 516 applies only to "lands leased as residential lots," occupied as residential property and contained within a "development tract." In no way can any application of the Chapter develop or encourage the development of any *new* residential property. If a scarcity of developed residential land indeed exists, then the State of Hawaii, which is the largest landowner of all, must be the greatest culprit of all, and *its* land should be taken. Instead, Chapter 516 attacks the last vestige of Hawaiian land—the revenues from which are used to educate Hawaiian children—and transfers that land to well-to-do lessees.

ARGUMENT

Act 307's impassioned preamble states that "present-day land ownership in the State [of Hawaii] is characterized by a concentration of fee title to lands in the hands of a few." It expounds that "[a]t least three-fourths of all privately held land in the State are (sic) currently owned by this small group of owners," and opines that "[m]uch of this land is in the rapidly developing urban areas of the State, where the need for single family residential lots is critical." Finally, the preamble confidently asserts:

> The population growth and the increase in demand for residential lots, and the concentration of ownership of private lands in the hands of a few and their practice of leasing, rather than selling in fee simple, the residential lots developed on their lands, have led to a serious shortage of residential fee simple property at reasonable prices in the State's urban areas and have deprived the people of the State of a choice

> to own or to take leases to the land on which their homes are situated.[59]

This justification for the challenged statute is spurious.

The very federal legislation which accorded Hawaii statehood, the Admissions Act, Pub. L. 86-3, 73 Stat 4 (1959), contains a challenge to the government of Hawaii relative to the availability of home ownership. Interestingly, it follows immediately an important reference to the betterment of conditions of Native Hawaiians. This federal legislation is Section 5(f) of the Admissions Act, which provides (in pertinent part):

> (f) The lands granted to the State of Hawaii by subsection (b) of this section and the public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of Native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, *for the development of farm and home ownership on as widespread a basis as possible*, for the making of public improvements, and for the provision of lands for public use. . . . (Emphasis supplied)[60]

The ceded lands referred to in Section 5(f) not only generate large amounts of State revenue each year but are themselves available for development into residential lots. These ceded lands, by the way, are only a part of the 36.5 percent of all of the lands in Hawaii owned by the State government of Hawaii.

It is submitted that, if the scarcity of developed residential property has in fact been caused by a "concen-

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[59] 1967 Haw. Sess. Laws Act 307, § 1(f).

[60] Hawaii Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959).

tration of ownership . . . in the hands of a few," then the largest land owner of all, the State of Hawaii, must be the greatest culprit of all.

Chapter 516 applies only to "lands leased as residential lots" occupied as residential property and contained within a "development tract." [61] Yet, the Act 307's preamble clearly states that the legislative purpose for the enactment of the Chapter was to attack the problem brought on by "population growth" and "increase in demand for residential lots." In no way can any application of Chapter 516 develop or make available any new residential lots not now already developed. Under the most basic economic principles, so long as the supply of a commodity remains the same while the demand for it increases, it is likely that one result will be an increase in the price of that commodity.

The scarcity of supply spoken of in the preamble appears to be the scarcity of developed residential lots. The statute by its own terms is not designed to effect or even encourage an increase in the supply of residential lots so as to meet demand and reduce prices. It is patently clear from a reading of the Chapter that the only purpose that the Chapter *can* fulfill is to convert *leasehold* residential lots to *fee simple* residential lots. It is submitted that those results will do absolutely nothing to reduce the cost of housing in Hawaii.

Actually, after acquiring the fee simple title under Chapter 516, a lessee will have substantially more invested in his lot. He will have to demand an even higher price for it when and if he should sell it. Thus, it would seem the process provided for under the Chapter will have the tendency to *increase* the cost of residential property, *not* decrease it.

Taking one person's private property in eminent domain simply to convey it to another person is not a "public

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[61] HAW. REV. STAT. § 516-2 (1976 repl.).

purpose" under anyone's definition. That is the only result assured by the challenged statute. In each case, the lessee, desirous of owning the fee simple interest in the land, applies under the statute to Appellant Hawaii Housing Authority. That agency condemns the interest from Appellees and sells the interest to the lessee. That is the total effect of the statute. There is no other effect.

Here, also, it must be kept in mind just who are the beneficiaries of Chapter 516. We are not dealing with poor, downtrodden tenants subjugated by a moustache-twisting and villanous landlord. Appellant associations represent affluent lessees who own expensive leasehold residential properties in the best neighborhoods of the City and County of Honolulu. Appellees are the trustees of a Native Hawaiian princess' only legacy to her people, left to them just at the time the rest of their world crumbled around them. If the roles were somehow reversed, or if Chapter 516 used the power of eminent domain to acquire land for a worthy purpose such as, for example, running a school for a disadvantaged group of citizens, then perhaps a public purpose argument could readily be made. Those are *not* the facts here, of course.

Your amicus is painfully aware of the role that the lands for which Appellees are the trustees must play in the betterment of the condition of Native Hawaiians and Hawaiians now and in the future. To reverse the lower court and uphold the statute would not, perhaps, cause an immediate and devastating crippling of the trust or the programs of the Schools described above. It is submitted, however, that it has taken us over two hundred years to arrive at the conclusion that Native Hawaiians and Hawaiians need special educational programs. How ironic it would be to start weakening the greatest source for such programs at this turning point in the history of the Hawaiian People.

CONCLUSION

For the reasons presented here, and those presented by Appellees herein, the Judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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